A

PERUMAHAN NCK SDN BHD

v.

MEGA SAKTI SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[COMPANIES (WINDING UP) NO: D5-28-526-2000]
24 JUNE 2005

C ***COMPANY LAW:*** *Winding up - Costs of petition - Petitioner's taxed costs and liquidators' remuneration are unsecured debts - Whether petitioner's taxed costs to be paid in priority over liquidators' remuneration - Companies Act 1965, ss. 232, 292*

D ***COMPANY LAW:*** *Winding up - Liquidators - Remuneration - Liquidators application to fix remuneration - Whether application to be stayed pending determination and payment of petitioner's taxed costs - Companies Act 1965, ss. 232, 292*

E ***COMPANY LAW:*** *Winding up - Priorities - Priority of payments of unsecured debts governed by s. 292 of the Companies Act 1965 - Debts of same class rank equally between themselves - Petitioner's taxed costs and liquidators' remuneration are debts of same class - Where assets of company insufficient, petitioner's taxed costs and liquidator's remuneration shall abate in equal proportions between themselves*

F The petitioner was granted costs against the respondent company with respect to a winding-up order made by the High Court on a petition presented by the petitioner. The petitioner's cost was taxed and determined. The liquidators sought and obtained an order that their remuneration be determined in accordance with s. 232(c) of the
G Companies Act 1965 (the Act). Pursuant thereto the liquidators applied to fix their remuneration on time cost basis. The petitioner then filed the present notice of motion praying that the liquidators' application for the fixing of their remuneration be stayed or dismissed pending the determination and payment of the petitioner's taxed costs. The petitioner
H claimed that the petitioner's taxed costs pursuant to the winding-up order should be determined and paid first out of the assets of the respondent company including but no limited to the realized assets before the payment of the liquidators' remuneration, costs and any other expenses. The liquidators, on the other hand, argued that under ss. 292(1)(a) and 292(2) of the Act, the petitioner's taxed costs and the liquidators
I remuneration are debts of the same class (*ie*, class (a) under s. 292(1)(a) of the Act), being debts of the same rank (in term of

priority) between them. Therefore, the liquidators argued that payment of the petitioner's taxed costs should not take precedent over the liquidators' remuneration (in term of priority).

Held (dismissing the petitioner's notice of motion with costs):

(1) In winding-up, all payments relating to petitioner's taxed costs and liquidators' remuneration are considered as unsecured debts of the company. Priority of payments of unsecured debt are governed by s. 292 of the Act. (para 12)

(2) Section 292(1)(a) clearly provides for first priority payment of the taxed costs of a petitioner payable under s. 220, together with (under the same class, thus same priority rank) the liquidators' remuneration and all other related costs and expenses of the winding-up. The fundamental principle contained in s. 292(2) is that each class of debts, namely (a) to (f) specified in subsection (1) is paid in full one by one in the order of priority (as specified in subsection (1) of s. 292) but as between debts in the same class, namely the various debts specified in any one class, they rank equally between themselves. (paras 13 & 15)

(3) The wording of 292(2) makes it crystal clear that the petitioner's taxed costs and the liquidators' remuneration are debts of the same class, namely class (a) of s. 292(1) and being debts of the same class rank equally between themselves. If the properties or assets of the company are sufficient, each of these payments shall be paid in full. If, on the other hand, the properties or assets of the company are insufficient to meet those payments in the same class both the petitioner's taxed costs and the liquidators remuneration shall abate in equal proportions between themselves. (para 17)

(4) In order to give effect to the provisions of s. 292(2) and in order to determine the total debts comprised in class (a) of s. 292(1)(a), all payments under the said class (a), including the remuneration of the liquidators must be determined first before any payments to each of the debts can be made out. The scheme of s. 292 grants equal priority to the petitioner's taxed costs and the liquidators' remuneration, therefore both debts have to be quantified and determined before any payment can be effected. Therefore there is no reason or requirement to stay the liquidators' application to fix their remuneration as applied by the petitioner. (para 18)

Case(s) referred to:
Re Audley Hall Cotton Spinning Company [1868] LR 245 ***(refd)***
Re Beni-Felkai Mining Co Ltd [1933] All ER Rep 693 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 220(1), (2), 232(c), 292(1)(a), (2)

Companies Act 1948 [UK], s. 319
Company (Winding-Up) Rules 1909 [UK], r. 187
Companies (Winding-Up) Rules 1949 [UK], r. 195

Other source(s) referred to:
Buckley on the Companies Act, 14th edn, vol 1

For the petitioner - T/n Paul Ong & Assocs
For the liquidators - T/n Iza Ng Yeoh & Kit

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali J:

The Application

[1] Enclosure 54 is the petitioner's notice of motion for the following orders:

(a) that the proceedings of the summons in chambers dated 10 August 2004 the liquidators' application *inter alia*, for the fixing and approval of the liquidators' remuneration, costs and expenses incurred) be stayed or dismissed pending the determination and payment of the petitioner's taxed costs for the winding-up order granted on 7 February 2001 and the dismissal of the respondent's appeal against the winding-up order on 25 February 2004 out of the assets of the respondent company including but not limited to the sum of RM421,881.26 which has been realized by the liquidators of the respondent company;

(b) that the costs of this application on solicitor-client basis be taxed and paid forthwith out of the assets of the respondent company including by not limited to the realized assets; and

(c) further and/or other relief as the Honourable Court may thinks fit and just.

The Facts

[2] The petitioner was granted costs against the respondent company with respect to *inter alia*:

(a) the winding-up order made by the High Court on 7 February 2001; and

(b) the dismissal of the respondent's appeal by the Court of Appeal against the winding-up order on 25 February 2004.

[3] The winding-up order was made on 7 February 2001 on a petition presented by the petitioner. The said winding-up order, *inter alia*, provided that:

> the costs of this petition and occasioned by this proceedings be paid out of the assets of the said company.

The directors, under their residual powers, appealed against the aforesaid winding-up order to the Court of Appeal and on 25 February 2004 the appeal was dismissed with costs. By summons-in-chambers dated 13 November 2003 the liquidators sought an order that their remuneration be determined in accordance with s. 232(c) of the Companies Act 1965. On 16 June 2004, this court ordered *inter alia* that the liquidators' remuneration be determined. Pursuant thereto the liquidators filed on 10 August 2004 another summons-in-chambers (encl. 49) for the following orders, *inter alia*:

(1) that the liquidators' remuneration from 1 May 2002 to 15 August 2003 be fixed on time cost basis in the amount of RM441,416.03;

(2) that the liquidators' remuneration from 16 August 2003 to 31 May 2004 be fixed on time cost basis in the amount of RM110,284.12;

(3) that all costs and expenses incurred by the liquidators from 1 May 2002 to 31 May 2004 be approved;

(4) that the retention by the liquidators of the sum of RM139,838.82 out of the assets of the respondent towards payment of their remuneration be approved;

(5) that the costs of this application on solicitor-client basis be paid out of the assets of the respondent.

[4] On 28 September 2004 the petitioner filed the present notice of motion (encl. 54).

[5] On 18 October 2004 the petitioner filed its notice of taxation pursuant the winding-up order dated 7 February 2001. On 21 December 2004 the deputy registrar taxed and determined the costs of the petitioner in the sum of RM13,081.50 inclusive of allocatur fee.

A **The Petitioner's Arguments**

[6] The grounds of the petitioner's application are, *inter alia*:

(a) the petitioner's taxed costs pursuant to the winding-up order made by the High Court on 7 February 2001 and the dismissal of the respondent's appeal by the Court of Appeal on 25 February 2004 should be determined and paid first out of the assets of the respondent company including but no limited to the realized assets before the payment of the liquidators' remuneration, costs and any other expenses;

(b) the liquidators' application (*vide* encl. 49) is premature.

[7] The petitioner argues that under the winding-up law and statutory requirements, the petitioner's costs with respect to the winding-up proceedings should be paid first in priority out of the assets of the respondent's company above and over all other costs and expenses including the liquidators remuneration. The petitioner cited s. 220(2) of the Companies Act 1965 to support this arguments. Section 220(2) of the Companies Act 1965 provides:

> The liquidator shall, unless the court orders otherwise, reimburse the petitioner out of the assets of the company the taxed costs incurred by the petitioner in any such proceedings.

Besides that, the petitioner also cited s. 292(1)(a) and s. 292(2) of the Companies Act 1965 to support it's arguments.

On top of that, the petitioner also relied on *Buckley on the Companies Act*, 14th edn, vol. 1; decided cases – In *Re Audley Hall Cotton Spinning Company* [1868] LR 245; and *Re Beni: Felkai Mining Co. Ltd.* [1933] All ER Rep 693.

[8] In reply to the liquidators' assertion that there would be sufficient assets to pay of the petitioner's costs, the petitioner submits that the purposed availability of RM14 million worth of assets remains a pure speculation without any concrete proof and since the liquidators are now claiming the sum of RM556,700.15 as their remuneration, costs and expenses, the total ascertained and realized assets of the respondent company in the amount of RM421,881.26 would have been totally exhausted leaving nothing to destroy the petitioner's costs and the end of the day.

The Liquidators' Arguments

[9] The liquidators, on the other hand, argue that under s. 292(1)(a) and s. 292(2) of the Companies Act 1965, the petitioner's taxed costs and the liquidators remuneration are debts of the same class (ie, class

(a) under s. 292(1)(a) of the Act and being debts of the same rank (in term of priority) between them. Therefore, the liquidators argue that payment of the petitioner's taxed costs should not take precedent over the liquidators' remuneration (in term of priority).

The Law

[10] The winding-up order dated 7 February 2001 (which was confirmed by the Court of Appeal) provided that "the costs of this petition and occasioned by this proceedings be paid out of the assets of the said company." Section 220(2) of the Companies Act 1965 provides:

> the liquidator shall, unless the court orders otherwise, reimburse the petitioner out of the assets of the company the taxed costs incurred by the petitioner in any such proceedings.

[11] The said winding-up order as well as the provisions of s. 220(2) of the Companies Act 1965 clearly stipulate that the taxed costs incurred by the petitioner in the winding-up proceedings shall be paid by the liquidator out the assets of the company. The terms "any such proceedings" (as appeared in s. 220(2) of the Act), refer to the "proceedings in the winding-up until the liquidator is appointed." This is clear from s. 220(1) of the same Act which provides that:

> The persons, other than the company itself or the liquidator thereof, on whose petition any winding-up order is made, shall at his own cost and expense prosecute all proceedings in the winding-up until the liquidator has been appointed under this part.

[12] Both the winding-up order as well as s. 220(2) of the Act do not provide as to what stage of the proceedings that the taxed costs of the petitioner shall be paid. There is also no mention either in the winding-up order nor in s. 220(2) as to the rank of priority in respect of the payment of the taxed costs of the petitioner. Section 220(2) does not in any way indicate that payment of the taxed costs of the petitioner should be made first before any payment for liquidators' remuneration (as argued by the petitioner in this case). In winding-up, all payments relating to petitioner's taxed costs and liquidators' remuneration are considered as unsecured debts of the company. Priority of payments of unsecured debt are governed by s. 292 of the Companies Act 1965. The scheme of s. 292 of the Companies Act 1965 in subsection (1) sets out 6 classes of debts and liabilities (paras a-f) which must be paid in priority to all other unsecured debt. The first class, which tops the priority rank is provided in s. 292(1)(a) which provides:

> (a) firstly, the costs and expenses of the winding-up including the taxed costs of a petitioner payable under section 220, the remuneration of the Liquidator, and the costs of any audit carried out pursuant to section 281.

[13] Section 292(1)(a) clearly provides for first priority payment of the taxed costs of a petitioner payable under s. 220, together with (under the same class, thus same priority rank) the liquidators' remuneration and all other related costs and expenses of the winding-up. It is also clear from s. 292(1)(a) that while costs and expenses of the winding-up include both the petitioner's taxed costs and the liquidator's remuneration, the expression "expenses of the winding-up" covers expenses which the liquidator may be compelled to incur in respect of his acts in the course of a proper liquidation of the company's assets, (per Maugham J in *Re Beni-Felkai Mining Co. Ltd.* [1933] All ER Rep 693 at p. 697)

[14] The order and extent of the priority of these 6 classes of debts is provided by subsection (2) of s. 292 which reads as follows:

> The debts in each class specified in subsection (1) shall rank in priority in the order therein specified but as between debts of the same class shall rank equally between themselves and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

[15] The fundamental principle contained in subsection (2) of s. 292 is that each class of debts, namely (a) to (f) specified in subsection (1) is paid in full one by one in the order of priority (as specified in subsection (1) of s. 292) but as between debts in the same class, namely the various debts specified in any one class, they rank equally between themselves. If the properties or the assets of the company are insufficient to pay the class in full, those debts shall abate in equal proportion between themselves and subsequent classes of debts do not get paid at all.

[16] The provisions of the law on this matter is very clear, particularly subsection 2, of s. 292 of the Companies Act 1965. There is no equivalent provisions in the English company laws. Therefore, the petitioner's reliance on all the authorities cited (which are based on the English law) does not help in determining the issue. The annotations in *Buckley on the Companies Acts* are not applicable to our position because the position in English law is different. There are not *pari materia* to our subsection 2 of s. 292 of our Companies Act 1965. Since, we have our own express provisions (under subsection 2, of s. 292) which are different from the English position, we have to follow and to apply our own provisions in the present case. As stated in Buckley on the *Companies Act* (at p. 552), the matter (in England) is governed by the Companies (Winding-Up) Rules 1949 (r. 195). Under r. 195, the order of priority for payments of debts in the event of liquidation, are as follows:

First – The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the court.

Next – The remuneration of the special manager (if any).

Next – The costs and expenses of any person who makes or concurs in making, the company's statement of affairs.

Next – The taxed charges of any shorthand writer appointed to take an examination: Provided that where the shorthand writer is appointed at the instance of the official receiver the cost of the shorthand notes shall be deemed to be an expense incurred by the official receiver in getting and realising the assets of the company.

Next - The necessary disbursements of any liquidator appointed in the winding-up by the court, other than expenses properly incurred in preserving realizing or getting in the assets heretofore provided for.

Next - The costs of any person properly employed by any such liquidator.

Next - The remuneration of any such liquidator.

Next - The actual out-of-pocket expenses necessarily incurred by the Committee of Inspection, subject to the approval of the Board of trade.

[17] Preferential payments under the English Companies Act 1948 are contained in s. 319, as well as r. 195 of the Companies (Winding-Up) Rules 1949. Section 319 does not expressly provide for payments for taxed costs and expenses of the winding-up petition and remuneration of liquidators. Those two items are found in r. 195 of the Companies (Winding-Up) Rules 1949 where such payments for costs and expenses of the winding-up petition rank first in priority while payment for liquidator's remunerations rank seventh (7th) on priority. Thus, under the English law the petitioner's costs are the first charge. In other words, the petitioner is entitled to have his costs paid first (in full) before the remuneration of the liquidator. The case of *Re Beni-Felkai Mining Co. Ltd. (supra)* cited by the petitioner was based on the Company (Winding-Up) Rules 1909 (r. 187) which was *pari materia* with r. 195 of the Companies (Winding-Up) Rules 1949. The case of In *Re Audley Hall Cotton Spinning Company* [1868] *(supra)* also relied on the same English law which had existed even before the company (Winding-Up) Rules 1909. These authorities clearly cannot be relied upon to support the petitioner's contention that in Malaysia the petitioner's taxed costs rank in priority to the liquidators' remuneration.

The wording of subsection 2 of s. 292 of our Companies Act 1965 makes it crystal clear that the petitioner's taxed costs and the liquidators' remuneration are debts of the same class, namely class (a) of s. 292(1) and being debts of the same class rank equally between themselves. If the properties or assets of the company are sufficient, each of these payments shall be paid in full. If, on the other hand, the properties or assets of the company are insufficient to meet those payments in the same class both the petitioner's taxed costs and the liquidators remuneration shall abate in equal proportions between themselves.

[18] In the present case, the petitioner's costs had been taxed at RM13,081. On the other hand, the liquidators remuneration has not been determined yet. In order to give effect to the provisions of subsection 2 of s. 292 of the Companies Act 1965 and in order to determine the total debts comprised in class (a) of s. 292(1)(a), all payments under the said class (a), including the remuneration of the liquidators must be determined first before any payments to each of the debts can be made out. The scheme of s. 292 grants equal priority to the petitioner's taxed costs and the liquidators' remuneration, therefore both debts have to be quantified and determined before any payment can be affected. Therefore there is no reason or requirement to stay the liquidators application to fix their remuneration as applied by the petitioner.

Under the circumstances, a stay should not be granted and the petitioner's notice of motion (encl. 54) should be dismissed with costs.